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April 29, 2009

FILED/ACCEPTED

APR 29 2009

Federal Communications Commission
Office of the Secretary

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation: WC Docket Nos. 08-24, 08-49*
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Yesterday, Brad Lerner of Cavalier Telephone, Charlie Hunter of Broadview Networks, Inc., Ed Cadieux of NuVox, Lisa Youngers and Heather Gold of XO Communications, LLC, Tony Hansel of Covad Communications, and Brad Mutschelknaus and the undersigned, of Kelley Drye & Warren LLP, met with Commissioner Adelstein's Legal Advisor Mark Stone. Our discussion focused on points summarized in the attached presentation which was distributed at the meeting.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed with your office via ECFS for inclusion in the public record of this proceeding.

Please contact me at (202) 342-8531, if you have any questions about this letter.

Respectfully submitted,

Genevieve Morelli

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PUBLIC VERSION

**THE COMMISSION SHOULD ADOPT A NEW STANDARD FOR
REVIEW OF UNE FORBEARANCE PETITIONS AND DENY
VERIZON'S PENDING APPLICATIONS FOR RHODE ISLAND AND
VIRGINIA BEACH**

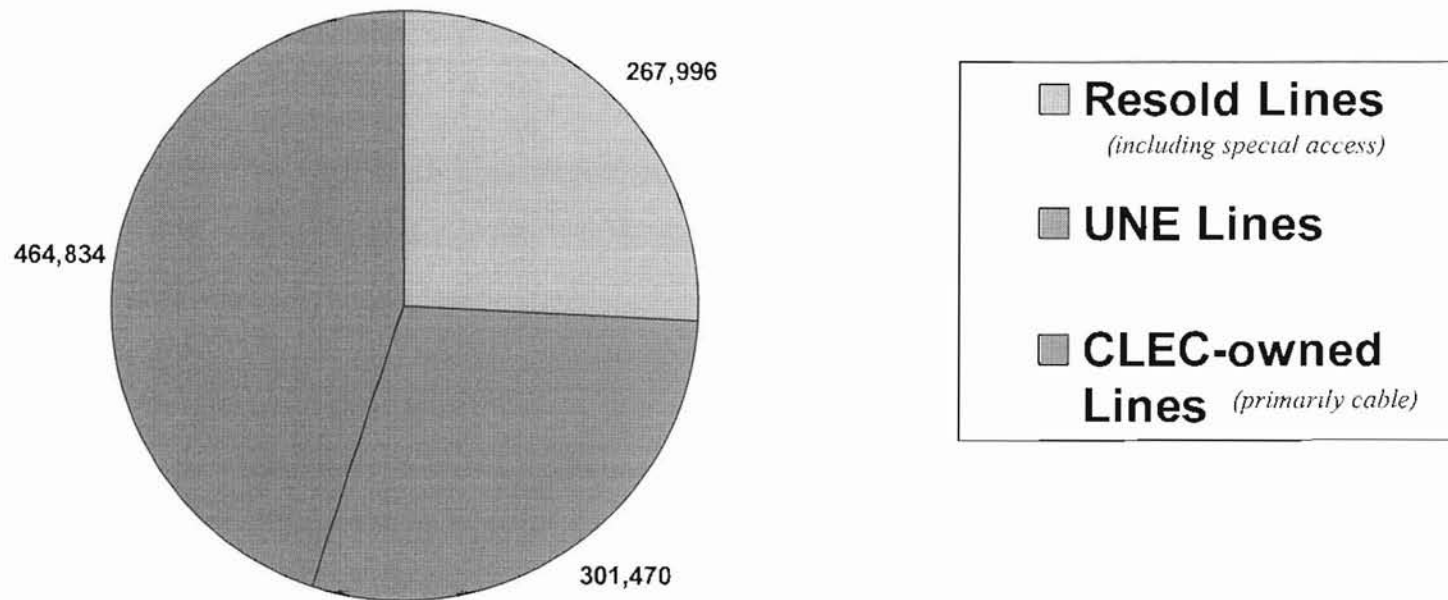
(WC Dockets No. 08-24 & 08-49)

Presented by Broadview Networks, Cavalier Telephone, Covad Communications,
NuVox and XO Communications

April 28, 2009

Cost-Based UNEs Remain Critical For The Provision Of Both Narrowband And Broadband Services By Competitors

- 54% of All CLEC Services in Virginia are Provided over ILEC-owned Loops, of which 53% are UNE



Source: FCC Local Competition Report, September 2009, Table 11

Cost-Based UNEs Remain Critical For The Provision Of Both Narrowband And Broadband Services By Competitors (*cont'd*)

- Most CLECs in the Affected Markets Rely Upon Cost-Based UNEs to Compete
 - At least 6 of 10 competitive carriers in Rhode Island depend upon UNE availability
 - 2 of 3 competitive carriers in Virginia Beach depend upon UNE availability
- Non-Cable CLECs are Particularly Dependent Upon UNE Availability

**Verizon Has Not Met Its Burden Of Proof Under Existing Precedent That
Facilities-Based Competitors Have Achieved An Adequate Level Of Market
Penetration**

*****BEGIN HIGHLY CONFIDENTIAL*****

Redacted - For Public Inspection

*****END HIGHLY CONFIDENTIAL*****

REDACTED - FOR PUBLIC INSPECTION

“Cut The Cord” Wireless Is Not Properly Included In The Wireline Services Market

- Since the *Qwest 4 MSA Order* was Released, Responsible Government Agencies have Concluded that Wireline and Wireless Services are Complementary, but Not Substitutable
 - US Department of Justice found no evidence that migration to wireless has effectively constrained prices paid for wireline telephone service
 - Ofcom determined that consumers predominantly view wireline and wireless as meeting different needs and prefer to purchase both
 - statistical study showed wireless is not a constraint on wireline pricing
 - determined that mobile wireless and wireline are separate product markets
- TURN/Roycroft Report Found that Wireless Does Not Reduce Incumbent Wireline Market Power
 - Service quality differences make substitution impractical for most consumers
 - Significant and systemic differences in the types of individuals that use only wireless demonstrate that wireless and wireline are not substitutes for mainstream users
- Treating Wireline and Wireless as Substitutable Would have Unintended Effects
 - Spillover to the definition of “unserved” and “underserved” for purposes of broadband deployment
 - State regulation of mobile wireless where they become a “substitute for landline” under Sec. 332(c)

Wholesale Advantage And Resale Lines Are Not Services Provided By Facilities-Based Competitors

- Commission has Determined that Only Services Provided by Competitors Over Their Own Loops Should be Included
- Prior Inclusion in Forbearance Calculations were Illustrative of a Failed "Best Case" for Applicants

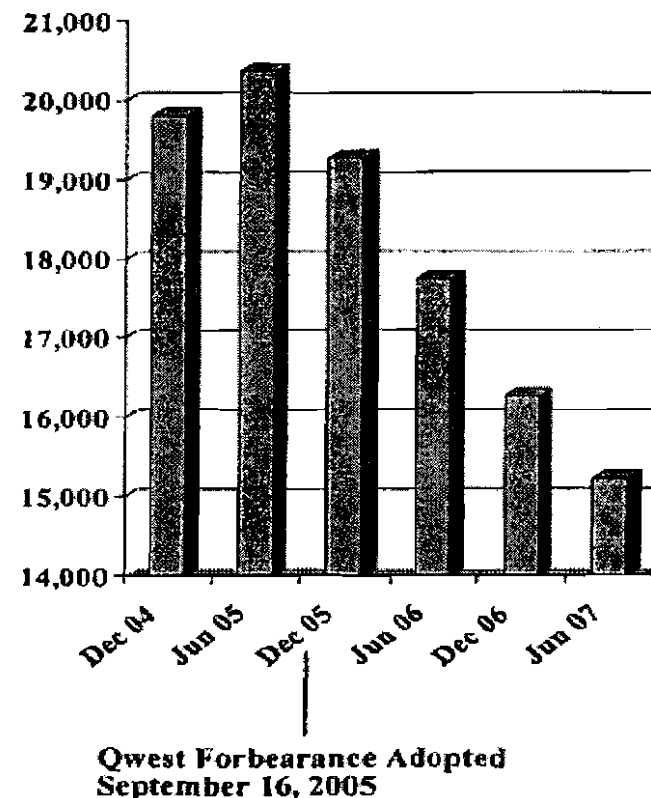
Wireline Duopoly Is Not In The Public Interest

- **The Current Wireline Telco/Cable Duopoly Obstructs U.S. Broadband Expansion**
 - Acting Chairman Copps has stated that the cable/telephone duopoly has led to a “stultifying lack of competition in the broadband market”
- **A Market Duopoly Does Not Deliver the Competition Guaranteed by the Act**
 - The Commission has repeatedly recognized the need for multiple non-incumbent facilities-based providers to ensure reasonable market competition
- **Market Duopolies are Inherently Noncompetitive**
 - Duopolies exhibit interdependent, parallel behavior
 - Can exercise sufficient market power to approximate monopoly behavior through explicit or implicit coordination
 - Natural effects include prices set above competitive levels, and employment and production that is not maximized
- **Duopoly Arrangements are Strongly Disfavored**
 - U.S. Department of Justice merger analysis
 - FCC merger analysis (Echostar/DirectTV)
- ***USTA I* Does Not Preclude a Finding that Wireline Duopolies are Not in the Public Interest**

The FCC's "Predictive Judgment" That Deployment Of Alternate Loop Facilities By Cox In The Omaha Residential Market Would Cause Both Qwest And Cox To Offer Replacement Wholesale Facilities In The Business Market Has Proven To Be Grossly Incorrect

- Qwest has Not Offered a Reasonably Priced UNE Replacement, and Enterprise Competition has Declined
- Cox has not Introduced a Meaningful Wholesale Offering Either
 - Resulted in rate increases of a least 30% for DSO loops, 138-165% for DS1 loop recurring charges (depending upon wire center) and 360% for DS1 loop non-recurring charges
- McLeod is Withdrawing from the Market
 - Has ceased all new sales

**Effect of Forbearance on
UNE-Loop Competition - Nebraska**



**Source Comptel Ex Parte, filed April 22, 2009*

CLECs Do Not Connect To A Significant Portion Of Commercial Buildings Over Their Own Loop Facilities In Any Rhode Island Or Virginia Beach Wire Center

Commercial Buildings Connected by CLEC Owned Loops in Rhode Island

Rate Center	Total Number of Commercial Buildings in MSA	% of Commercial Buildings Served by Facilities-Based CLECs
Bristol	818	0.37%
Carolina	386	0.52%
Centredale	1442	0.42%
Coventry	678	0.00%
Cumberland Hill	216	0.00%
Greenwich	1350	0.59%
Hope Valley	346	0.58%
Jamestown	306	0.33%
Little Compton	220	0.00%
Narragansett	1821	0.71%
Newport	2198	0.41%
North Kingstown	1120	0.36%

CLECs Do Not Connect To A Significant Portion Of Commercial Buildings Over Their Own Loop Facilities In Any Rhode Island Or Virginia Beach Wire Center

Commercial Buildings Connected by CLEC Loops in Rhode Island (cont'd)

Rate Center	Total Number of Commercial Buildings in MSA	% of Commercial Buildings Served by Facilities-Based CLECs
Pascoag	611	0.65%
Pawtucket	3900	0.56%
Portsmouth	566	0.88%
Providence	12,361	0.87%
Scituate	681	0.00%
Tiverton	623	0.48%
Warren	1111	0.09%
Warwick	1986	1.06%
West Glocester	9	0.00%
West Warwick	1946	0.62%
Westerly	1285	0.86%
Woonsocket	1651	0.85%

CLECs Do Not Connect To A Significant Portion Of Commercial Buildings Over Their Own Loop Facilities In Any Rhode Island Or Virginia Beach Wire Center

Aggregate Commercial Demand Addressable by CLECs Over Their Own Loops in Rhode Island

Rate Center	Total Demand (DSOs) in Commercial Buildings	% of Total Demand in Commercial Buildings Addressable by Facilities-Based CLECs
Bristol	7091	3.74%
Carolina	2786	1.29%
Centredale	11,306	0.57%
Coventry	4772	0.00%
Cumberland Hill	2353	0.00%
Greenwich	11,599	3.60%
Hope Valley	1971	0.51%
Jamestown	2090	0.53%
Little Compton	1419	0.00%
Narragansett	19,362	3.15%
Newport	22,755	4.18%
North Kingstown	8570	0.35%

CLECs Do Not Connect To A Significant Portion Of Commercial Buildings Over Their Own Loop Facilities In Any Rhode Island Or Virginia Beach Wire Center

Aggregate Commercial Demand Addressable by CLECs Over Their Own Loops in Rhode Island (cont'd)

Rate Center	Total Demand (DSOs) in Commercial Buildings	% of Total Demand in Commercial Buildings Addressable by Facilities-Based CLECs
Pascoag	3777	0.82%
Pawtucket	31,733	6.65%
Portsmouth	3771	2.89%
Providence	140,461	8.22%
Scituate	4814	0.00%
Tiverton	3672	1.39%
Warren	9342	1.64%
Warwick	21,042	12.87%
West Glocester	34	0.00%
West Warwick	16,694	5.59%
Westerly	11,620	2.07%
Woonsocket	13,713	6.53%

CLECs Do Not Connect To A Significant Portion Of Commercial Buildings Over Their Own Loop Facilities In Any Rhode Island Or Virginia Beach Wire Center

Commercial Buildings Connected by CLEC Owned Loops in Virginia Beach

Rate Center	Total Number of Commercial Buildings in MSA	% of Commercial Buildings Served by Facilities-Based CLECs
Gloucester	808	0.37%
Hayes	604	0.33%
Newport News 1	3615	3.29%
Newport News 2	4170	2.37%
Newport News 3	3551	2.00%
Newport News 4	418	0.00%
Norfolk 1	3342	3.08%
Norfolk 2	22928	3.57%
Norfolk 3	5937	2.24%
Norfolk 4	2846	2.11%
Norfolk 6	573	1.05%
Toano	361	1.39%
Williamsburg	2719	2.50%

CLECs Do Not Connect To A Significant Portion Of Commercial Buildings Over Their Own Loop Facilities In Any Rhode Island Or Virginia Beach Wire Center

Aggregate Commercial Demand Addressable by CLECs Over Their Own Loops in Virginia Beach

Rate Center	Total Demand (DSOs) in Commercial Buildings	% of Total Demand in Commercial Buildings Addressable by Facilities-Based CLCEs
Gloucester	7321	6.42%
Hayes	4965	1.43%
Newport News 1	35,370	21.72%
Newport News 2	39,031	16.33%
Newport News 3	32,173	8.31%
Newport News 4	2410	0.00%
Norfolk 1	31,891	19.15%
Norfolk 2	224,266	23.72%
Norfolk 3	48,333	10.76%
Norfolk 4	22,334	9.82%
Norfolk 6	2951	3.25%
Toano	2946	3.12%
Williamsburg	31,718	12.90%

We Have Offered A Revised Standard That Addresses Concerns Expressed By The Sitting Commissioners

- Two Alternate Paths for Determining Whether There is Sufficient Competition in Last Mile Facilities
 - The “Wholesale Test”
 - Two or more facilities-based non-ILEC wireline competitors in the wholesale loop market
 - Each of which has deployed end-use connections to 75 percent of end-user locations
 - And has deployed sufficient OSS to support wholesale demand
 - And has garnered at least 15 percent of wholesale loop market share
 - The “Retail Test”
 - At least 75 percent of end-user locations
 - Are served by two or more facilities-based non-ILEC wireline competitors
 - That offer retail service via loops deployed by such competitors
 - And have generated at least 15 percent of retail market share
- Assessed Separately for Each Relevant Product Market

Wholesale And Retail Services Are Different Product Markets

- “Wholesale” is an Upstream Input, whereas “Retail” is the Downstream Finished Product to Consumers
 - “Wholesale” Providers do not necessarily compete in the retail market, and retail competitors do not necessarily offer their facilities for lease
 - Consistent with FCC analysis of product market analysis for satellite services
- Since Forbearance is Sought from Rules Requiring Verizon to Offer Wholesale Facilities, Separate Analysis of the Wholesale Market is Especially Appropriate
- Specific Wholesale Products are UNEs from which Verizon Seeks Relief, Including DSO Loops, Conditioned Copper Loops, DS1 Loops, DS3 Loops, DS1 Transport and DS3 Transport
- Specific Retail Products are Those Provided Through Use of UNEs as Inputs, Including Voice and Broadband Services

Residential and Business Are Separate Product Markets, Requiring Separate Proof And Analysis

- Separate Sets of Services and Features Demanded by Customers
- Different Approaches to Sales and Marketing
- Varying Levels of Customer Service
- Distinct Network Requirements
- Divergent Pricing